IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-604

DONALD C. CASS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

Neither Reference to Other Statutes or to Administrative Interpretations Show That Petitioner's Construction of the Statute Is Not Correct

In order to demonstrate that the rounding provision of 10 U.S.C. § 687(a) does not apply to the eligibility requirement the government cites several statutes which relate to a number of other military pay provisions. (Resp. Brief at 11). However, these provisions lend support to the Petitioner's view of § 687(a).

Except for 42 U.S.C. § 212 and 10 U.S.C. § 6330, none of the statutes cited by the government contain eligibility provisions within the statute itself. Therefore, as to those statutes, no question arises as to whether the rounding provision applies to the determination of eligibility. As to 42 U.S.C. § 212, the rounding provision expressly applies to the computation of the pay and not to the eligibility provisions, but 10 U.S.C. § 6330 (Resp. Brief n.2) expressly applies the rounding provision to the eligibility requirement as well as to the computation of the payment. Therefore, it is apparent that Congress has not adopted any uniform scheme as to the applicability of a rounding provision in military pay statutes.

The government asserts that it is highly unlikely that Congress would specify a period of "at least five years of continuous active duty" as an eligibility requirement in 10 U.S.C. § 687(a) and then reduce this period to four and one-half years by virtue of the rounding provision. However, an examination of 10 U.S.C. § 6330 shows that Congress specified a completion period of "20 or more years of active service" for eligibility under that statute, yet the later rounding provision in the statute was made expressly applicable to the eligibility requirement, thereby reducing it to nineteen and one-half years.

The eligibility requirement and the computation formula in 10 U.S.C. § 6330 are set forth in subsections (b) and (c) respectively, and the prefatory phrase to the rounding provision states "For the purposes of subsections (b) and (c) . . . ." The only difference in the rounding provision of § 687(a) is that the prefatory phrase reads "For the purposes of this subsection . . . ." The prefatory language of § 6330 could

not be used in § 687(a) because both the eligibility requirement and the computation procedure are set forth in one subsection. Nevertheless, it is clear that the language of the rounding provision of § 687(a) manifests a congressional intent which is identical to the congressional intent expressed by the rounding provision of § 6330.

The government's reliance upon administrative interpretation of 10 U.S.C. § 687(a) in support of its construction of the statute is misplaced. The courts are the final authorities on issues of statutory construction and a court should not rubber stamp an administrative construction which is contrary to the plain meaning of a statute or contrary to the congressional intent underlying the statute. *Volkswagenwerk v. FMC,* 390 U.S. 261 (1968). Here, the administrative interpretation is contrary to the plain meaning of the statute. Additionally, the denial of readjustment pay to those such as the Petitioner frustrates the congressional policy underlying readjustment pay. (See Pet. Brief at 19-20).

The cases cited by the government, wherein this Court gave deference to administrative construction, are distinguishable from the case now before the Court. In *Udall v. Tallman,* 380 U.S. 1 (1965), the Court was not required to construe a statute, but rather an executive order and an Interior Department regulation. In this situation, the Court was willing to defer to an administrative construction of its administrative order. In *Red Lion v. F.C.C.,* 395 U.S. 367 (1969), the Court held that the Federal Communications Commission's application of the "fairness doctrine" was authorized under the Communications Act. The Court noted that the F.C.C. had consistently construed the

Act to confer this authority under the "public interest" language of the Act. Congress had acquiesced in this construction for thirty years and Congress ultimately had expressly accepted the F.C.C. construction. Therefore, the cases cited by the government are not applicable to this case.

The Government Has Not Cited Any Authority Which Dictates That This Court Should Cast Aside the Plain Meaning of 10 U.S.C. § 687(a)

The government cites several cases in its brief in support of its effort to have this Court rely upon the legislative history of 10 U.S.C. § 687(a) rather than the plain meaning of that section. The cited cases are distinguishable from this case and therefore are not applicable to this case.

In *United States v. American Trucking Ass'ns.*, 310 U.S. 534 (1940) this Court did recognize that where the application of the plain meaning of a statute produces "unreasonable" results "plainly at variance with the policy of the legislation as a whole" then the Court may disregard the plain meaning of the statute. 310 U.S. at 543. However, the government has made no attempt to demonstrate to this Court that the payment of readjustment pay to those such as the Petitioner herein would be plainly contrary to the policy behind readjustment pay.[1] On the other hand, Peti-

[1] The government has represented that a reduction of the eligibility requirement to four and one-half years would create a potential liability to the government of $12,000,000. There is absolutely no evidentiary basis for this representation in the record of this case, in *Schmid* v. *United States*, 436 F.2d 987 (Ct. Cl. 1971), *cert. denied*, 404 U.S. 951, or any other readjustment pay case that Petitioner is aware of. This Court should not let this unsupported representation influence its construction of § 687(a). Additionally, any potential

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er has demonstrated that the policy behind readment pay is to encourage reservists to remain in service beyond four years with the understanding they will be compensated if involuntarily released. refore, the *American Trucking* case does not sup- the government's argument.[2] Moreover, the rt noted in that case:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." 310 U.S. at 543.

he Petitioner's brief cited two decisions of this rt which state that where the meaning of a statry codification is clear a court should not endeavor

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lity has been created by the government's policy of involuny releasing reserves from active duty just prior to the completof five years so that a readjustment payment could be avoided. re is no evidence that the government would have incurred any lity if the government had followed the plain meaning of the ute since the 1962 codification. Rather, it is likely that the govment would have instituted a policy of involuntarily releasing rves just prior to the completion of four and one-half years of inuous service. The government should not be permitted to pe the consequences of its voluntary failure to follow the plain ning of § 687 (a) by arguing to this Court that Congress could have intended to have the government voluntarily incur a ential liability of $12,000,000.

[2] This Court's opinion in *Lynch* v. *Overholser*, 369 U.S. 705 (1962) is also inapplicable to the case at bar because the Court went beyond the plain meaning of the statute at issue in order to free the statute from constitutional doubts. 369 U.S. at 711. The portion of *Utah Junk Co.* v. *Porter*, 328 U.S. 39 (1946), quoted in the government's quotation from *Lynch*, was taken out of context. This Court said in *Utah Junk*:

> "All construction is the ascertainment of meaning. And literalness may strangle meaning. *But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy.*" 328 U.S. at 44. (emphasis supplied).

to determine whether the codification changed the meaning of the former statute. (Pet. Brief at 15-16). The government asserts that in both *Continental Casualty Co. v. United States,* 314 U.S. 527 (1942), and *United States v. Bowen,* 100 U.S. 508 (1880), this Court's decision to follow the plain meaning of the statute at issue was based upon the Court's view as to the purpose of the original legislation. The government's assertion is erroneous.

In *Continental Casualty, supra,* this Court expressly stated:

> "Hence, not for reasons of policy, but *because of the language of the statute,* we conclude that Congress has chosen the former." 314 U.S. at 531 (emphasis supplied).

In *Bowen, supra,* this Court followed the plain meaning of the statute at issue for the following reason:

> "[W]e are of the opinion that the reasonable force of the language used in that section, taken in connection with the whole of the chapter devoted to that subject, and the accepted canons of interpretation, leave room for no other construction than that [plain meaning] . . . ." 100 U.S. at 513.

Clearly, this Court relied only on the language of the statutes as a basis for its decisions in *Continental Casualty, supra,* and *Bowen, supra.*

The government argues that *Continental Casualty, supra,* and *Bowen, supra,* have been overruled by more recent cases to the extent that the former cases suggest that a court should not resort to extrinsic aids in construing codified statutes. (Resp. Brief n.10 citing *City of Greenwood v. Peacock,* 384 U.S. 808;

Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222). The Court of Appeals for the Fifth Circuit considered this question in *Barbee v. United States*, 392 F.2d 532 (5th Cir. 1968) and concluded:

> "When the meaning of a revised statute has been clear, courts have refused to consider any conflicts in revisionary history. *United States v. Bowen* . . . *Continental Casualty Co. v. United States* . . . On the other hand, when the meaning of a revised statute has been subject to doubt, courts have relied heavily on the revisors for guides to interpretation . . . *Fourco Glass Co. v. Transmirra Products Corp.* . . . *City of Greenwood, Mississippi v. Peacock.* [Citations omitted].
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> * * *
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> *We have found no conflict in the substance of the above cases.*" 392 F.2d at 535 n.4 (emphasis supplied).

The Fifth Circuit has recognized that this Court's rationale in *Continental Casualty, supra,* and *Bowen, supra,* applies when the meaning of a revised or codified statute is clear on its face. Since the meaning of 10 U.S.C. § 687(a) is clear on its face, the cases cited by the government are inapplicable. In accordance with its decisions, this Court should not resort to legislative history in deciding this case.

The Government's Theory That Congress Made an Inadvertent Mistake Cannot Be Supported to the Extent That the Plain Meaning of 10 U.S.C. § 687(a) Should Be Set Aside

The thrust of the government's argument is that Congress made an inadvertent mistake when it codified the readjustment pay statute into 10 U.S.C. § 687(a). This argument is based upon the theory that the language of § 687(a) does not express the actual intent of Congress, which, according to the government, was to

apply the rounding provision only to the computation of the payment.

It is significant that in reviewing the legislative history of the readjustment pay statutes the government argues that the House also made an inadvertent mistake in its 1956 readjustment pay bill since the language of the House bill, according to the government, did not express the actual intent of the House. The government urges that during the House debate of the 1956 bill Congressman Brooks explained that the rounding provision was not intended to be applied for the purpose of determining eligibility. According to the government's theory, the Comptroller General informed the Senate as to the inadvertent mistake on the part of the House and the Senate thereafter amended the rounding provision expressly to limit its applicability to the computation of the amount of the payment. (Resp. Brief at 14-17).

Petitioner submits that the government's view as to the intent of the House in 1956 is no more conclusive than its view as to the intent of Congress in 1962. An examination of the floor debate on the 1956 House bill reveals no statement which is inconsistent with the intent of the House to apply the rounding provision to the eligibility requirement. 102 Cong. Rec. 10117-10120. Although Representative Brooks made several references to a minimum requirement of five years of continuous active duty, these statements are not inconsistent with the fact that this minimum requirement could be fulfilled after four and one-half years by virtue of the rounding provision. For example, the rounding provision of 10 U.S.C. § 6330 is applicable to the eligibility requirement without being in-

consistent with the number of years for eligibility expressly set forth in § 6330(b).

The Comptroller General's letter to the Chairman of the Senate Committee on Armed Services stated that "presumably" the rounding provision of the 1956 House Bill was contrary to the intent of the House insofar as the eligibility requirement was concerned. (See Pet. Brief at 18). It is clear that the Comptroller General did not actually know what the intent of the House was. Although the Senate's amendment to the rounding provision was contained in the enacted statute, this does not negate the possibility that the House originally intended to apply the rounding provision to the eligibility requirement but later acquiesced to the Senate amendment. This view is supported by the statement of Representative Brooks to the effect that the intent of the House readjustment pay bill was to induce reservists to stay in the service beyond an initial four year period. (See Pet. Brief at 20).

Petitioner therefore submits that the Court of Claims correctly found in *Schmid, supra,* that the restoration of the language of the original House bill by virtue of the 1962 codification is a strong indication that in 1962 Congress intentionally adopted the language and intent of the 1956 House bill which clearly made the rounding provision applicable to the eligibility requirement. (See Pet. Brief at 19). This view is much more probable than the government's theory that Congressional bodies made inadvertent mistakes on two different occasions. The government is asking this Court to set aside the plain meaning of 10 U.S.C. § 687 (a) on the basis that the 1962 Congress coincidentally and mistakenly adopted the exact same rounding provision which the House mistakenly adopted in 1956.

Such a theory is too tenuous to justify a rewriting of § 687(a) by this Court.

The government conceded at the oral argument of this case that it has made no effort to overcome the *Schmid* decision by requesting legislation from Congress, although it has been over two years since this Court denied *certiorari* in *Schmid*. Congress has taken no action in this regard on its own initiative. The government now seeks to have this Court undo what the government claims is a mistake on the part of Congress. In view of the inconclusive legislative history supporting the government's construction of the statute, this Court should hold that the statute means what it says and that the Petitioner is entitled to readjustment pay.

CONCLUSION

For the reasons stated the judgment of the Ninth Circuit should be reversed, and the case remanded with instructions to affirm the decision of the district court.

Respectfully submitted,

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